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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 MARTIN SALDANA-VASQUEZ,

15 Defendant.

CASE NO. 09cr4495 WQH

ORDER

HAYES, Judge:

16 The matter before the Court is the motion to suppress statements filed by Defendant
17 Martin Saldana-Vasquez. (Doc. # 7-3).

18 **FACTS**

19 On October 20, 2009, Defendant applied for admission into the United States through
20 the Calexico, California West Port of Entry. Defendant was the driver of a Ford Windstar.
21 Defendant's sister was a passenger in the vehicle. Defendant was referred to secondary
22 inspection. At secondary inspection, Customs and Border Patrol Officers found eight packages
23 in the vehicle which they believed contained methamphetamine.

24 After formal arrest, Defendant was interviewed by Immigration and Customs
25 Enforcement agents. The interview was videotaped. The video shows that Defendant initially
26 answered background questions asked by Special Agent Stout in the English language. Special
27 Agent Estrada then informed the Defendant in the Spanish language that he was arrested for
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1 importation of drugs, and that he will be taken to jail. Agent Estrada informed the Defendant
 2 of his *Miranda* rights. Defendant stated that he understood each of his rights. Agent Estrada
 3 informed the Defendant that the agents were conducting an investigation into the people
 4 involved with the importation and that this was his opportunity to tell the agents what
 5 happened. Defendant stated that his sister did not have “anything to do with this.”
 6 (Defendant’s Transcript Doc. # 10 at page 27).

7 Defendant: She was along for a ride.
 8 Estrada: And until ... that is determined, we can’t let anyone
 9 go. Right now both of you are arrested and we
 10 have to take you to jail. I mean that’s the way the
 11 laws are.
 12 Defendant: Okay.

13 *Id.* Agent Estrada asked the Defendant to read aloud the statement of rights and the waiver of
 14 rights.

15 Defendant: I prefer to talk to you [] without signing this
 16 because I need an attorney.
 17 Estrada: Okay, so, you are asking for an attorney–.
 18 Defendant: Yes...
 19 Estrada: Okay, so, you’re not going to sign this because
 20 you’re not, you’re not waiving your rights.
 21 Defendant: No.

22 *Id.* at 28. Agent Estrada ceased questioning the Defendant and informed Agent Stout in the
 23 English language that “he wants an attorney.” *Id.* at 29. Agent Stout responded to Agent
 24 Estrada “Okay. All right.” *Id.* The video shows that Agent Estrada then got up from her
 25 chair and walked a few steps to an adjacent counter preparing to process the Defendant. After
 26 Agent Estrada stood up and walked over to the counter, the Defendant made the following
 27 statement in the Spanish language:

28 Okay. It would be a little like prolonging the process, right? At the end of the
 day, I am the, I am the, the accused. Man I can’t tell the truth ... It doesn’t
 matter. You ...you aren’t going to believe me.”

Id. at 29. ¹ Agent Estrada responded:

¹The Government seeks to admit this statement at trial as inculpatory asserting that the proper translation of the Defendant’s statement is “I am the guilty one” not “I am the accused” as reflected in the transcript submitted by the Defendant in Doc.# 10.

1 Estrada: That, that, that doesn't mean that the process is
going to be prolonged because tomorrow when ...
2 you will be given the attorney tomorrow.

3 Defendant: Okay.

Estrada: Okay? Th-, the only thing that happens is that we
don't talk to you now.

4 Defendant: Okay. I am going to talk to the attorney.

5 *Id.* Defendant was processed and no further questions were asked or statements were made.

6 On December 16, 2009, the grand jury returned an indictment charging Defendant with
7 knowingly and intentionally importing methamphetamine in violation of 21 U.S.C. § 952 and
8 960 and knowingly and intentionally possessing methamphetamine with intent to distribute in
9 violation of 21 U.S.C. § 841(a)(1).

10 DISCUSSION

11 1. *Miranda*

12 Defendant moves the Court to suppress the statement he made after Agent Estrada stood
13 up and walked to the counter asserting a *Miranda* violation. Defendant asserts that the
14 statement at issue was made after he requested counsel and should be suppressed. The
15 Government asserts that the agent ceased all questioning when the Defendant requested
16 counsel and that the statement at issue was spontaneous.

17 "Once warnings have been given, the subsequent procedure is clear, . . . If the individual
18 states that he wants an attorney, the interrogation must cease until an attorney is present."
19 *Miranda v. Arizona*, 384 U.S. 436, 473-474 (1966). In *Rhode Island v. Innis*, 446 U.S. 291
20 (1980), the United States Supreme Court was asked to determine "whether the respondent was
21 'interrogated' in violation of the standards promulgated in the *Miranda* opinion." *Id.* at 293.
22 Respondent had been identified by a taxicab driver as the man who had robbed him "wielding
23 a sawed-off shotgun." *Id.* at 293. Respondent was taken into custody, informed of his
24 *Miranda* rights, and invoked his *Miranda* right to counsel. Respondent was placed in a police
25 car. While enroute to the central station, police officers engaged in a conversation concerning
26 the "missing shotgun" including a comment by one officer to another officer that "'it would
27 be too bad if a little ... girl would pick up the gun, maybe kill herself.' Respondent then
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1 interrupted the conversation, stating that the officers should turn the car around so he could
 2 show them where the gun was located.” *Id.* at 295. The Supreme Court explained:

3 The issue, ... is whether the respondent was ‘interrogated’ by the police officers
 4 in violation of the respondent’s undisputed right under *Miranda* to remain silent
 5 until he had consulted with a lawyer. In resolving this issue, we first define the
 term ‘interrogation’ under *Miranda* before turning to a consideration of the facts
 of this case.

6 The starting point for defining ‘interrogation’ in this context is, of course, the
 7 Court’s *Miranda* opinion. There the Court observed that ‘[b]y custodial
 8 interrogation, we mean *questioning* initiated by law enforcement officers after
 9 a person has been taken into custody or otherwise deprived of his freedom of
 action in any significant way.’ *Id.*, at 444, 86 S.Ct., at 1612 (emphasis added).
 This passage and other references throughout the opinion to ‘questioning’ might
 suggest that the *Miranda* rules were to apply only to those police interrogation
 practices that involve express questioning of a defendant while in custody.

10 We do not, however, construe the *Miranda* opinion so narrowly. The concern of
 11 the Court in *Miranda* was that the ‘interrogation environment’ created by the
 12 interplay of interrogation and custody would ‘subjugate the individual to the will
 of his examiner’ and thereby undermine the privilege against compulsory self
 incrimination. *Id.*, at 457-458, 86 S.Ct., at 1619. ...

13 This is not to say, however, that all statements obtained by the police after a
 14 person has been taken into custody are to be considered the product of
 interrogation. As the Court in *Miranda* noted:

15 Confessions remain a proper element in law enforcement. Any
 16 statement given freely and voluntarily without any compelling
 17 influences is, of course, admissible in evidence. *The fundamental*
 18 *import of the privilege while an individual is in custody is not*
 19 *whether he is allowed to talk to the police without the benefit of*
 20 *warnings and counsel, but whether he can be interrogated. . . .*
 Volunteered statements of any kind are not barred by the Fifth
 Amendment and their admissibility is not affected by our holding
 today.” *Id.*, at 478, 86 S.Ct., at 1630 (emphasis added).

21 It is clear therefore that the special procedural safeguards outlined in *Miranda*
 22 are required not where a suspect is simply taken into custody, but rather where
 a suspect in custody is subjected to interrogation. ‘Interrogation,’ as
 conceptualized in the *Miranda* opinion, must reflect a measure of compulsion
 above and beyond that inherent in custody itself.

23 We conclude that the *Miranda* safeguards come into play whenever a person in
 24 custody is subjected to either express questioning or its functional equivalent.
 25 That is to say, the term ‘interrogation’ under *Miranda* refers not only to express
 26 questioning, but also to any words or actions on the part of the police (other than
 27 those normally attendant to arrest and custody) that the police should know are
 reasonably likely to elicit an incriminating response from the suspect. The latter
 portion of this definition focuses primarily upon the perceptions of the suspect,
 rather than the intent of the police. This focus reflects the fact that the *Miranda*

1 safeguards were designed to vest a suspect in custody with an added measure of
2 protection against coercive police practices, without regard to objective proof of
3 the underlying intent of the police. A practice that the police should know is
4 reasonably likely to evoke an incriminating response from a suspect thus
5 amounts to interrogation. But, since the police surely cannot be held
6 accountable for the unforeseeable results of their words or actions, the definition
7 of interrogation can extend only to words or actions on the part of police officers
8 that they *should have known* were reasonably likely to elicit an incriminating
9 response.

6 Turning to the facts of the present case, we conclude that the respondent was
7 not 'interrogated' within the meaning of *Miranda*. It is undisputed that the first
8 prong of the definition of 'interrogation' was not satisfied, for the conversation
9 between Patrolmen Gleckman and McKenna included no express questioning
10 of the respondent.

9 ... It is out view [] that the respondent was not subjected by the police to words
10 or actions that the police should have known were reasonably likely to elicit an
11 incriminating response from him.

11 446 U.S. at 298-304 (footnotes omitted).

12 This Court must make a factual determination based upon the evidence whether the
13 statement at issue was the product of interrogation. In this case, the video shows that the
14 Defendant was informed of his *Miranda* rights and invoked his right to counsel. Agent Estrada
15 conducting the interview with the Defendant in the Spanish language acknowledged the
16 Defendant's request for an attorney and ceased all questioning. Agent Estrada then informed
17 the other agent in the English language that "he wants an attorney." Agent Estrada stood up
18 and walked a few steps to an adjacent counter preparing to process the Defendant. These are
19 actions by Agent Estrada normally attendant to an arrest. The actions of the agents created no
20 reason for the Defendant to perceive any compulsion to make a statement. Defendant made
21 a spontaneous statement that was not the product of any words or actions of the agents. The
22 video shows that the statement made by the Defendant was not in response to express
23 questioning or a result of any words or actions on the part of the police (other than those
24 normally attendant to arrest and custody) that the agents should have known was reasonably
25 likely to elicit an incriminating response from the Defendant. The Court concludes that the
26 statement was a volunteered statement. "Volunteered statements of any kind are not barred
27 by the Fifth Amendment and their admissibility is not affected by our holding today."

1 *Miranda*, 440 U.S. at 478 (emphasis added). The evidence in this record established that the
 2 Defendant's request for counsel was complied with by the agents and that no violation of
 3 *Miranda* occurred in this case.

4 **2. Voluntariness**

5 "In evaluating voluntariness, the 'test is whether, considering the totality of the
 6 circumstances, the government obtained the statement by physical or psychological coercion
 7 or by improper inducement so that the suspect's will was overborne.' " *United States v. Male*
 8 *Juvenile*, 280 F.3d 1008, 1022 (9th Cir. 2002) (quoting *Derrick v. Peterson*, 924 F.2d 813, 817
 9 (9th Cir. 1991)). The Supreme Court has found officers' threats against family members to be
 10 coercive. *See e.g. Lynumn v. State of Illinois*, 372 U.S. 528, 534 (1963)("[P]etitioner's oral
 11 confession was made only after the police had told her that state financial aid for her infant
 12 children would be cut off, and her children taken for her , is she did not 'cooperate'").

13 In this case, the Court concludes that there are no facts to support any physical or
 14 psychological coercion or improper inducement. The agent's reference to the Defendant's
 15 sister who was a passenger in the car Defendant was driving at the time of his arrest in
 16 combination with Defendant's concern for his sister does not amount to a threat or improper
 17 coercion by the agents.

18 **3. Invocation**

19 Defendant further asserts that the statement at issue cannot be used against him because
 20 the statement itself was an invocation of his right against self-incrimination. Even if
 21 unsolicited, Defendant contends that this statement was a part of his invocation and protected
 22 by the Fifth Amendment of the United States Constitution. The Government contends that the
 23 content of the statement is not affirmative evidence that he is invoking his right to remain
 24 silent.

25 In *United States v. Bushyhead*, 270 F.3d 905 (9th Cir. 2001), the Court of Appeals held
 26 that admission of Bushyhead's statement "I have nothing to say, I'm going to get the death
 27 penalty anyway" violated his Fifth Amendment privilege against self-incrimination.

1 Bushyhead's statement was made as a government agent approached the defendant holding a
 2 printed *Miranda* warning statement in his hand. In *Bushyhead*, the Government relying upon
 3 *Rhode Island v. Innis*, asserted that Bushyhead "was not silent but rather voluntarily chose to
 4 talk to the agent." *Id.* at 912. The Court of Appeals concluded:

5 In contrast to the statements in *Innis*, Bushyhead's statement was not an
 6 unsolicited confession but the invocation of silence itself. In the post-*Miranda*
 7 context, the Court has unequivocally held that a person's statement invoking his
 8 right to silence is part of the 'silence' that must be protected. With respect to
 9 post-*Miranda* warnings 'silence,' we point out that silence does not mean only
 muteness; it includes the statement of a desire to remain silent, as well as of a
 desire to remain silent until an attorney has been consulted. Just as a prosecutor
 at trial cannot use the fact of defendant's post-*Miranda* silence, he also cannot
 use a statement such as "I am not going to say anything," or "I'm not saying
 anything until my lawyer gets here."

10 *Id.* at 912-913 (quotations and citations omitted). The Court of Appeals concluded that "[t]he
 11 entirety of Bushyhead's statement was an invocation of his right to silence and is therefore
 12 protected by the Fifth Amendment privilege against self-incrimination." *Id.*

13 In this case, the court concludes that the statement of the Defendant at issue is not a
 14 further statement of his desire to remain silent until an attorney can be consulted. In response,
 15 Agent Estrada assured the Defendant that he would have an opportunity to consult with an
 16 attorney the next day. Defendant stated: "Okay" and the agents continued processing his
 17 arrest. The Court concludes that Defendant's statement was a volunteered statement
 18 referencing only a desire to avoid delay.

19 CONCLUSION

20 IT IS HEREBY ORDERED that the motion to suppress statements filed by Defendant
 21 Martin Saldana-Vasquez (Doc. # 7-3) is denied.

22 DATED: April 15, 2010

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24 WILLIAM Q. HAYES
 25 United States District Judge
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